Public Prosecutor v Tamilarasan a/l Monirajah & Anor

HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO BA-45C-1–03 OF 2018
AHMAD FAIRUZ JC
11 OCTOBER 2018

Criminal Law — Sentence — Principles of sentencing — Accused persons charged under ss 326 and 365 of the Penal Code — Accused persons pleaded guilty — Accused persons convicted — Appropriate sentence — Whether sentences should run concurrently or consecutively — Penal Code ss 326 & 365

The accused persons were originally charged for kidnapping under s 3 of the Kidnapping Act 1961. The public prosecutor offered two alternative charges to the accused persons with condition that they plead guilty to the both alternative charges. The first alternative charge was for causing grievous hurt under s 326 of the Penal Code ('the PC') ('grevious hurt charge') and the second alternative charge was for kidnapping with intent to wrongfully confine under s 365 of the PC ('kidnapping charge'). Both the accused persons pleaded guilty and the court then convicted both the accused persons. This judgment was related to the sentences imposed by the court against both the accused persons.

Held:

(1) The plea of guilty by both accused persons saved court time. Therefore, this was a factor that would work in favour of the accused persons. The plea of guilty warranted credit to be given to the accused persons (see paras 16 & 18).

(2) There was proximity of time between the two offences. On the issue of proximity of place, the offences were committed in one of the rooms in the second accused's house. In terms of continuity of action and, community of purpose which at that point, was to ensure that they achieve the objective of being paid, was clearly established. The injuries were deliberately caused during that said period to further pressure the victim. The preconditions to the one transaction rule had been fulfilled. Hence, the imposition of a concurrent sentence was the correct sentence to pass. The kidnapping/wrongful confinement of the victim was amateurishly carried out but the injuries inflicted on the victim were serious. However, no such exhibits were produced in court to enable the court to examine the weapons used (see paras 28–29 & 33–36).

(3) For the offence under s 326 of the PC, the sentence of eight years imprisonment with two strokes of whipping was a sentence that was within the parameters of an acceptable imprisonment terms. It reflected the current trend of sentencing. For the offence of kidnapping with intention to secretly or wrongful confine under s 365 of the PC, a sentence of three years was appropriate, and it did commensurate with the offence committed where the confinement was less than 24 hours. The court found that justice was served if both the punishments were to run concurrently (see paras 40–42).

[Bahasa Malaysia summary

Tertuduh-tertuduh pada asalnya didakwa atas penculikan di bawah s 3 Akta Penculikan 1961. Pendakwa raya menawarkan dua tuduhan alternatif kepada tertuduh dengan syarat mereka mengaku bersalah atas kedua-dua tuduhan alternatif. Tuduhan alternatif pertama adalah untuk menyebabkan kecederaan yang teruk di bawah s 326 Kanun Keseksaan ('KK') ('tuduhan kecederaan yang teruk') dan tuduhan alternatif kedua adalah untuk menculik dengan niat untuk mengurung secara salah di bawah s 365 KK ('tuduhan penculikan'). Kedua-dua tertuduh mengaku bersalah dan mahkamah kemudian mensabitkan kedua-dua tertuduh. Penghakiman ini adalah berkaitan dengan hukuman yang dikenakan oleh mahkamah terhadap kedua-dua tertuduh.

Diputuskan:

(1) Pengakuan bersalah oleh kedua-dua tertuduh menjimatkan masa mahkamah. Oleh itu, ini merupakan faktor yang akan memihak kepada tertuduh. Pengakuan bersalah membenarkan kredit untuk diberikan kepada tertuduh (lihat perenggan 16 & 18).

(2) Terdapat kedekatan antara kedua-dua kesalahan. Mengenai isu tempat kedekatan, kesalahan dilakukan di salah satu bilik di rumah tertuduh kedua. Dari segi kesinambungan tindakan dan, tujuan komuniti yang pada ketika itu, adalah untuk memastikan bahawa mereka mencapai matlamat pembayaran, jelas dibuktikan. Kecederaan itu sengaja disebabkan semasa tempoh tersebut untuk memberi tekanan kepada mangsa. Prasyarat untuk peraturan satu transaksi telah dipenuhi. Justeru, pengenaan hukuman serentak adalah hukuman yang tepat untuk diberikan. Penculikan/pengurungan secara salah kepada mangsa telah dilakukan secara kurang kepakaran tetapi kecederaan yang dilakukan terhadap mangsa adalah serius. Walau bagaimanapun, tiada bukti diberikan di mahkamah untuk membolehkan mahkamah memeriksa senjata yang digunakan (lihat perenggan 28–29 & 33–36).

(3) Bagi kesalahan di bawah s 326 KK, hukuman penjara lapan tahun dengan dua sebatan adalah hukuman yang berada dalam parameter hukuman yang boleh diterima. Ia mencerminkan trend semasa

hukuman. Bagi kesalahan menculik dengan niat untuk kurung secara rahsia atau salah di bawah s 365 KK, hukuman tiga tahun adalah sesuai dan ia sepadan dengan kesalahan yang dilakukan di mana pengurungan itu kurang daripada 24 jam. Mahkamah mendapati bahawa keadilan disampaikan jika kedua-dua hukuman itu dijalankan secara serentak (lihat perenggan 40–42).]

Notes

For a case on principles of sentencing, see 4(3) *Mallal's Digest* (5th Ed, 2018 Reissue) para 4238.

Cases referred to

Amrita Lal Hazra v Emperor 42 Cal 957 (refd)
Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534; [2004] 2 CLJ 572, CA (refd)
Chin Choy v PP [1955] MLJ 236, CA (refd)
Iwan Bujang Dara & Anor v PP [2017] 3 MLJ 630; [2017] 1 LNS 285, CA (refd)
Jayaraman & Ors v PP [1979] 2 MLJ 88 (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167; [1987] 2 CLJ 405, SC (folld)
New Tuck Shen v PP [1982] 1 MLJ 27; [1982] CLJ Rep 606 (refd)
Pendakwa Raya v Nai Boon Wah [2011] MLJU 1132, CA (distd)
PP v Jafa bin Daud [1981] 1 MLJ 315 (refd)
PP v Prabu s/o Veeramuthu & Ors [2009] 3 MLJ 838; [2010] 8 CLJ 257, HC (folld)
PP v Ravindran & Ors [1993] 1 MLJ 45, HC (refd)
PP v Rozita bt Mohamad Ali [2018] 9 MLJ 1; [2018] 9 CLJ 265, HC (refd)
PP v Sulaiman bin Ahmad [1993] 1 MLJ 74, HC (refd)
PP v Teh Ah Cheng [1976] 2 MLJ 186; [1976] 1 LNS 116 (refd)
R v Ball (1951) 35 Cr App Rep 164 (refd)
SA Jamil bin Md Yusof v PP [2002] 6 MLJ 106; [2002] 7 CLJ 132, HC (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134, FC (refd)
Sim Gek Yong v PP [1995] 1 SLR 537, HC (refd)
Tan Lay Chen v PP [2001] 1 MLJ 135; [2000] 4 CLJ 492, HC (refd)
Tan Sri Abdul Rahim bin Mohd Noor v PP [2001] 3 MLJ 1; [2001] 4 CLJ 9, CA (refd)
Yusmarin bin Samsudin v PP [1999] 4 MLJ 625; [1999] 4 CLJ 391, CA (refd)

Legislation referred to

Criminal Procedure Code ss 282, 292
Kidnapping Act 1961 s 3
Penal Code ss 320, 326, 365

Mahmoodah Abdul Latiff (Deputy Public Prosecutor, Selangor State Legal Advisor's Office) for the appellant.
Saladin Mohd Yasin (Saladin & Assoc) for the first accused.
Ridha Abdah Subri (Ridha & Rai) for the second accused.

Ahmad Fairuz JC:

BACKGROUND

[1] The accused persons were originally charged for kidnapping under s 3 of the Kidnapping Act 1961. The public prosecutor, in exercise of his discretion, offered two alternative charges to the accused persons with condition that they plead guilty to the both alternative charges. The first alternative charge was for causing grievous hurt under s 326 of the Penal Code ('the grevious hurt charge') and the second alternative charge was for kidnapping with intent to wrongfully confine under s 365 of the Penal Code ('the kidnapping charge').

[2] Upon being offered the said alternative charges, both the accused persons pleaded guilty. The court went on to remind the accused persons of the consequences of their plea. The court then asked them if they wish to maintain their guilty plea. They were firm in their decision.

[3] Both accused persons also admitted to the facts presented by the prosecution. This court then accepted the plea of guilty and convicted them on the two alternative charges that they had each pleaded to. This court was satisfied that the pleas were unequivocal and unqualified.

[4] This court then sentenced each of the accused persons to eight years imprisonment and two strokes of whipping for the grievous hurt charge under s 326 of the Penal Code. For the kindnapping charge under s 365 of the Penal Code, this court sentenced both the accused persons to three years imprisonment. Both sentences were ordered to run concurrently from the date of arrest.

[5] by a notice of appeal dated 16 August 2018, the public prosecutor appealed to the Court of Appeal on the inadequacy of sentence imposed by this court.

[6] This is the grounds of judgment of this court.

THE CHARGE

The alternative charges

Pertuduhan Pilihan (1)

Bahawa kamu bersama-sama pada 16.9.2017 di antara jam 9.30 malam sehingga 11 malam bertempat di sebuah rumah di alamat No 56-1A, Tingkat 1, Jalan Bendahara 55, Taman Saujana Jati, Klang di dalam daerah Klang, dalam Negeri Selangor, dalam mencapai niat bersama, telah memukul Raja a/l Sudalaindy No KPT: 690212-05-5275 dengan menggunakan rotan, paip besi dan pisau panas sehingga menyebabkan kecederaan parah di kepala, retak tulang peha, retak jari serta melecur di pipi dan peha. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 326 Kanun Keseksaan yang boleh dihukum di bawah akta yang sama dibaca bersama seksyen 34 Kanun Keseksaan.

Hukuman

Hendaklah dihukum dengan pemenjaraan selama tempoh yang boleh sampai 20 tahun dan hendaklah juga dikenakan denda atau sebat.

Pertuduhan Pilihan (2)

Bahawa kamu bersama-sama pada 16.9.2017 jam lebih kurang 9 malam bertempat di Jalan Raja Nong, di dalam daerah Klang, dalam Negeri Selangor, dalam mencapai niat bersama, telah menculik Raja a/l Sudalaindy, No KPT: 690212-05-5275 dengan niat untuk mengurung bagi mendapatkan wang tebusan sebanyak RM7,000. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 365 Kanun Keseksaan yang boleh dihukum di bawah akta yang sama dibaca bersama seksyen 34 Kanun Keseksaan.

Hukuman

Hendaklah dihukum dengan pemenjaraan selama tempoh yang boleh sampai 7 tahun dan hendaklah juga dikenakan denda.

THE FACTS OF THE CASE

[7] The learned deputy public prosecutor tendered the following facts before this court:

1. Pada tarikh 16 September 2017, jam lebih kurang 9 malam, semasa mangsa iaitu Raja a/l Sudalaindy berada di Jalan Raja Nong, telah berjumpa dengan dua (2) lelaki India iaitu kedua-dua tertuduh di dalam kes ini dan satu (1) (P) bangsa Indonesia untuk tujuan membeli mesin welding.

2. Walau bagaimanapun, mangsa enggan membeli mesin welding tersebut kerana mensyaki mesin welding tersebut merupakan barang curi. Akibatnya telah berlaku pertengkaran dan tertuduh pertama telah memukul mangsa di bahagian kepala dengan menggunakan rotan.

3. Kedua-dua tertuduh turut mengambil wang milik mangsa berjumlah RM 260.00 dari poket seluar yang dipakai oleh mangsa.

4. Kedua-dua tertuduh telah mengikat mangsa di bahagian tangan, kaki dan mulut. Mata mangsa turut ditutup dan dibawa ke rumah tertuduh pertama.

5. Di rumah tersebut, mangsa telah dipukul oleh kedua-dua tertuduh dengan menggunakan rotan dan paip besi sehingga mangsa mengalami kecederaan di bahagian mulut, kepala dan kedua-dua tangan.

6. Kedua-dua tertuduh juga telah menggunakan pisau panas dan meletakkan di pipi mangsa sehingga melecur.

7. Mangsa ditahan di suatu bilik dalam rumah tersebut. Tangan dan kaki mangsa diikat, manakala mulut mangsa disumbat dengan kain supaya tidak bergerak atau meminta tolong.

8. Tertuduh pertama juga telah menghubungi isteri mangsa menggunakan telefon bimbit mangsa dan meminta supaya diserahkan wang sebanyak RM10,000 sekiranya ingin mangsa dilepaskan.

9. Isteri mangsa menyatakan tiada wang, dan akhirnya satu persetujuan telah dicapai supaya bayaran sejumlah RM7,000 dibuat kepada kedua-dua tertuduh supaya mangsa dilepaskan.

10. Pada tarikh 17.9.2017 jam lebih kurang 9.00 pagi, isteri mangsa telah pergi berjumpa tertuduh kedua di hadapan Kuil Sri Sentosa yang mana isteri mangsa telah menyerahkan wang berjumlah RM 7,000. Tertuduh kedua juga merampas jam tangan jenama Rolex yang dipakai oleh isteri mangsa.

11. Kira-kira sejam selepas wang diserahkan kepada tertuduh kedua, mangsa dilepaskan. Walau bagaimanapun, telefon bimbit dan kad pengenalan mangsa dirampas dan dimaklumkan akan dipulangkan sekiranya baki sejumlah RM3,000 diselesaikan.

12. Pada tarikh 17.9.2017 jam lebih kurang 1 tengahari, kedua-dua tertuduh telah ditangkap.

13. Kawad cam telah dijalankan pada 19.9.2017 dan mangsa mengecam kedua-dua tertuduh sebagai orang yang menculik dan memukulnya sehingga cedera.

14. Mangsa telah membuat laporan polis pada tarikh 17.9.2017seperti mana Klang Report: 30492/17.

15. Mangsa telah mendapatkan rawatan di Hospital Tengku Ampuan Rahimah Klang pada tarikh 17.9.2017 dan disahkan mengalami:

    (i) Laceration wound over scalp;

    (ii) 1st degree burn over left cheek & thigh;

    (iii) Superficial laceration wound over left thigh;

    (iv) Closed fracture over left femur;

    (v) Closed chip fracture over right middle finger; and

    (vi) Soft tissue injury.

16. Oleh yang demikian, kedua-dua tertuduh telah melakukan satu kesalahan seperti mana di dalam pertuduhan pilihan dan kedua-dua tertuduh mengaku salah.

SUBMISSION BY PARTIES

[8] Both counsels on record Encik Saladin bin Mohd Yasin and Encik Ridha Abdah Subri were appointed by the court.

[9] Encik Saladin bin Mohd Yasin submitted that the first accused was 36 years old, married and has two children. He is an odd job worker with an income of less than RM3,000 per month. He is remorseful and promises not to get involved in any crime in future.

[10] Encik Ridha Abdah Subri submitted that the second accused cooperated with the police which led to the recovery of the monies involved. He is remorseful and prior to his arrest, he was taking care of his aged mother. He is also the leader in the family taking care of his sisters as his father had passed away. His willingness to plead guilty at the earliest possible opportunity showed remorse on his part and had saved the court's time.

[11] The learned DPP Puan Mahmoodah bt Abdul Latiff on the other hand, contended that the offence committed by both the accused persons were serious in nature. Serious injury had been caused to the victim that warranted a heavy punishment. The DPP also submitted that the accused persons should not have taken the law into their own hands irrespective of the disagreement between the parties. She submitted that public interest demands a detetent sentence.

ANALYSIS AND DECISION OF THIS COURT

[12] This court is guided by the rule that a sentence passed must one that is in accordance with law. This means that the sentence imposed must not only be within the ambit of the punishable section but must also be assessed and passed in accordance with established judicial principles (*Tan Lay Chen v Public Prosecutor* [2001] 1 MLJ 135; [2000] 4 CLJ 492).

[13] It is also a recognised principle that the discretion in passing sentence is solely with the sentencing court. In *New Tuck Shen v Public Prosecutor* [1982] 1 MLJ 27; [1982] CLJ Rep 606, Wan Yahya J held as follows:

> ... The right to impose punishment on a guilty party is absolutely the discretion of the court. It will exercise that power judicially but wll not tolerate any encroachment or even semblance of encroachment either by the prosecution or the defence in respect of such right.

[14] The principles on sentencing were also succinctly spelt out in the case of *Yusmarin bin Samsudin v Public Prosecutor* [1999] 4 MLJ 625; [1999] 4 CLJ 391 by Siti Norma Yaacob J (as she then was) where she held:

> The principles of sentencing have long been entrenched and well settled in our criminal law jurisprudence and a court seized with such jurisdiction is empowered to take into account the following considerations:
>
> (1) the extent and seriousness of the offence committed;
>
> (2) the guilty person's antecedents; and
>
> (3) the public interest.

[15] The court took into account the plea in mitigation presented by both counsels. It was submitted by both counsels and agreed by the prosecution that the two accused persons were first offenders and had no previous criminal records. In *Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315, apart from expanding the principles in relation to sentencing, Mohamed Azmi J held as follows:

> A 'sentence according to law' means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles. *In assessing sentence, one of the main factors to be considered is whether the convicted person is a first offender. It is for this purpose that before passing sentence, a Magisrate is required to call for evidence or information regarding the background, antecedent and character of the accused*. Where the convicted person has previous records and admits them as correct, the court must consider whether the offence or offences omitted previousl were of similar nature as the one with which he is presenty charged. The court must then consider the sentences imposed in the previous convictions for similar offences to determine whether they have had any deterrent effect on him. Where he is found to be a persistent offender for a similar type of offences, then it is in the interest of justice that a deterrent sentence should be passed and, in such a case, unless there are exceptional circumstances, the quantity, nature of value of the subject-matter of the offence with which he is currently charged can very rarely constitute a mitigating factor.

[16] It is a generally accepted rule that a person should be given credit or discount for pleading guilty (*Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45; *Public Prosecutor v Sulaiman bin Ahmad* [1993] 1 MLJ 74). The plea of guilty by both accused persons saved court time. This court therefore, found this as a factor that would work in favour of the accused persons. Whether a person is a hardened criminal or otherwise, a plea of guilt is a mitigating factor (*Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134).

[17] As to what amount of credit is attached to the plea of guilty depends on the facts and circumstances of the case. It is not automatic. If the offence committed by the accused outweigh the mitigating effect of a guilty plea or

where the public interest demands a deterrent sentence (*Sim Gek Yong v Public Prosecutor* [1995] 1 SLR 537). However, when the plea of guilt is considered by the court, the question therefore, what is the value of such a plea. In *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167; [1987] 2 CLJ 405, the guidance given was a discount of one third of the sentence that would otherwise have been imposed by the court can be considered by the sentencing court.

[18] This court was of the considered view that the plea of guilty warranted credit to be given to the accused persons. They had admitted to the alternative charges immediately upon being offered the opportunity by the DPP.

[19] However, it would be remiss on this court if it did not consider public interest apart for the interest of the accused persons. In fact it should be the foremost consideration as the object of punishment is not only with the objective of punishing crime but also preventing it (*R v Ball* (1951) 35 Cr App Rep 164).

[20] The Federal Court in the case of *Iwan Bujang Dara & Anor v Public Prosecutor* [2017] 3 MLJ 630; [2017] 1 LNS 285 (FC) as follows:

> But the court is not only concerned with the plea in mitigation in passing sentence. No matter how strong the plea in mitigation is in favour of a lenient sentence, *the court's overriding consideration has always been and will always be the public interest.*

[21] Against public interest is the personal interest of the two accused persons (see *Tan Sri Abdul Rahim bin Mohd Noor v Public Prosecutor* [2001] 3 MLJ 1; [2001] 4 CLJ 9). The mitigation of both the accused persons touched on the family factor. That they were the sole bread winners and were taking care of their families. Such reasons are not uncommon.

[22] In *Public Prosecutor v Teh Ah Cheng* [1976] 2 MLJ 186; [1976] 1 LNS 116, Eusoffe Abdool Cader J (as he then was) opined at p 187 (MLJ):

> The respondent also puts forward in his plea in mitigation the fact that he is employed and supports an aged mother and step-brothers. He should of course have thought of this before committing the offence and not after, he is in fact pleading hardship arising from the consequences of his own acts and I would reiterate what I had occasion previously to observe in another case that an offender should not expect to excite or harness an sympathy on an *ipse dixit* by taking the stance of the impetuous youth who killed his parents with an axe and then pleaded in mitigation that he was an orphan.

[23] As such, a balance needs to be struck between the interest of the public and the individual interest.

CONCURRENT OR CONSECUTIVE SENTENCE

[24] Sections 282 and 292 are the relevant provisions in the Criminal Procedure Code that provides a discretion to the sentencing Court when considering a concurrent or consecutive sentence. The position in law was lucidly explained in *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534; [2004] 2 CLJ 572 at p 579 of the report. The court held as follows:

> The combined effect of ss 282 and 292 is that unless the court imposing a sentence says anything to the contrary, the sentence runs from the date on which it was passed (see *Ooi Sim Yim v Public Prosecutor* [1990] 1 MLJ 88). The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. In deciding whether the terms of imprisonment should be consecutive or commence at another date, the court will be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction, *all sentences in respect of these offences should be concurrent rather than consecutive* (see *R v Saleem* (1964) Crim LR 482; *R v Walsh* (1965) Crim LR 248) ... (Emphasis added.)

[25] The test to be applied in considering the one transaction rule would be to determine if the four elements of proximity of time, proximity of place, continuity of action and continuity of purpose or design were present (see *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88; *Amrita Lal Hazra v Emperor* 42 Cal 957; *Chin Choy v Public Prosecutor* [1955] MLJ 236).

[26] This principle was affirmed in the Court of Appeal in *Public Prosecutor v Prabu s/o Veeramuthu & Ors* [2009] 3 MLJ 838; [2010] 8 CLJ 257 which provided the following guidance:

> ... the court should be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences were committed in the course of one transaction, all sentences in respect of those offences should be concurrent rather than consecutive. For there to be one transaction, there must be four elements present, ie, proximity of time, proximity of place, continuity of action and continuity of purpose or design.

[27] Similarly, in the case of *SA Jamil bin Md Yusof v Public Prosecutor* [2002] 6 MLJ 106; [2002] 7 CLJ 132, it was held as follows:

> What amounts to 'distinct' offences was established by the Indian case of *Amrita Lal Hazra & others v Emperor* ILR 42 Cal 957 where it was held that there are four main tests which help in the legal determination as to what amounts to 'the same transaction'. They are proximity of time, unity or proximity of place, continuity of action and community of purpose or design.

[28] In carrying out an examination of the facts, what is patently clear to this court was the fact that the said kidnapping/illegal confinement was carried out at 9pm on the night of 16 September 2017. It lasted until the time the victim was released the following morning on 17 September 2017. It was during the said period of confinement that the injuries were caused. The charge sheet pertaining to the grievous hurt charge as found in P3(a), stated that the injuries were inflicted during the course of the illegal confinement (between 9.30–11pm). This allows this court to rule that there was proximity of time between the two offences. On the issue of proximity of place, this court will not venture at length to rule that the offences were committed in one of the rooms in the second accused's house.

[29] Similarly, in terms of continuity of action and, community of purpose which at that point, was to ensure that they achieve the objective of being paid, was clearly established. The injuries were deliberately caused during that said period to further pressure the victim.

[30] However, the one transaction and totality principle is not cast in stone and in situations where it warrants a departure from the one transaction principle, the court may do so in the interest of justice. Also, if the facts so warrant or if the intended outcome of sending the message of abhorrence to the action of the offender needs to be highlighted by the court to the public, the court is at full liberty to decide accordingly.

[31] Even if the imprisonment had a crushing effect on the accused by virtue of it being lengthy in total, in *Pendakwa Raya v Nai Boon Wah* [2011] MLJU 1132 the Court of Appeal, speaking through Hasan bin Lah J (as he then was), justified the departure from the one transaction rule as follows:

> As decided in *Sau Soo Kim* the question whether the sentences should run consecutively or concurrently must depend upon the particular circumstances of the case. On the facts and circumstances of this case and in line with the decisions of this court in *Bachik Abdul Rahman*, *Yit Kean Hong* and *Prabu Veeramuthu* we are of the view that this is a proper case for the court to apply the exception to the one transaction rule and the totality principle in deciding to order the two terms of imprisonment to run consecutively. In addition, the two offences committed by the respondent were very serious and each punishable with imprisonment of up to 20 years. This case also involved two separate and distinct offences and two different victims. In this case too a matter which attracted the application of the exception to the one transaction principle was the fact that the second killing resulted from merciless anger. The facts show that the respondent came back to finish off the second deceased after having dealt with the first deceased at the entrance of the bistro. The second deceased was still at the table where he had originally sat offering no resistance when the respondent stabbed him to death. We are further of the view that consecutive sentences are necessary in order to discourage violent crime affecting the human body resulting in death as public interest is paramount. Had

the learned judge given adequate consideration to the circumstances and facts of this case and the authorities referred to earlier he would have, in our view, ordered that the two sentences to run consecutively. It is our judgment that the learned judge had erred in not applying the exception to the one transaction rule and the totality principle to this case.

[32] In *Nai Boon Wah* the Court of Appeal had every reason to disagree with the on transaction rule. The acts carried out were sensless and nefarious. Any decision other than the one taken in that case would be manifestly contrary to public interest (see also *Prabu Veeramuthu*, *Bachik Abdul Rahman*).

[33] In the current case before this court, it is the finding of this court that the preconditions to the one transaction rule laid down in *Amrita Lal* have been fulfilled. That being the case, upon considering the facts, this court is of the view that the imposition of a concurrent sentence is the correct sentence to pass. Clearly, the facts and circumstances did not fall near those shown in *Nai Boon Wah*.

[34] From the facts presented by the prosecution, the kidnapping/wrongful confinement of the victim was amateurishly carried out. The two accused persons had actually contacted the wife of the victim directly and even went on to pick up the said ransom personally. They also retained the identity card of the victim as collateral to ensure that the wife pays the balance of their original demand of RM10,000.

[35] The injuries inflicted on the victim were however, serious. The fracture suffered by the victim as stated in the medical report P9, showed that there was a closed fracture on the femur and a chip fracture on the finger. This fell under the definition of grevious hurt in s 320 of the Penal Code. There was also a first degree burn mark on the left cheek and tigh of the victim.

[36] From the facts of the case, the accused persons used a piece of *rotan* and an iron rod to hit the victim. However, no such exhibits were produced in court to enable this court to examine the weapons used. The pictures tendered into court as P8 also showed a variety of weapons such as an axe and other paraphernalia that could cause the injuries suffered by the victim. However, the prosecution did not allude to any of the items shown in the photographs to link with the injuries inflicted on the victim.

LENGTH OF SENTENCE

[37] On the grievous hurt charge, this court looked at precedents to determine as a guide, the appropriate sentence to impose on the accused

persons. No two facts would be similar and the circumstances of how the offences were committed can never be the same. However, this court is allowed to be guided by precedent.

[38] In the recent case of *Public Prosecutor v Rozita bt Mohamad Ali* [2018] 9 MLJ 1; [2018] 9 CLJ 265, the High Court embarked on a comparison of the trend of sentencing imposed by courts in recent years. The precedents are reproduced below:

> [43] Keeping in the forefront of my mind all the authorities aforesaid, I shall now examine some cases of similar offence with regard to sentencing —
>
> (a) *Rosli bin Supardi* the Court of Appeal substituted the sentence of six years' imprisonment and three strokes with twelve years' imprisonment and five strokes. The appellant claimed trial and convicted. He was a first offender. The victim's throat was cut several times;
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> (b) *Annantan Subramaniam v Public Prosecutor* [2006] MLJU 648; [2007] 8 CLJ 1 the High Court maintained the sentence of *eight years and eight strokes*. The appellant aged 20, pleaded guilty and a first offender. The weapon used was a rambo knife. The victim was stabbed in her abdomen and her throat was cut after the appellant raped her. All in all the appellant suffered twenty years imprisonment as the sentence for s 326 was made to run concurrently with the twenty years' imprisonment for rape;
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> (c) *Abdul Kassim bin Idris v Public Prosecutor* [2007] 4 MLJ 738 the High Court affirmed the sentence of *fifteen years' imprisonment and three stokes*. The appellant 39, claimed trial and convicted. The weapon used was a pair of scissors. The victim suffered stab wounds and cut wound at the neck region and the abdominal region and death was caused to the child in her womb;
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> (d) *PP v Kow Ngo* [2009] MLJU 1867; [2010] 5 CLJ 208 the High Court enhanced the sentence of one-day imprisonment and fine RM1,500 to *five years' imprisonment*. The respondent aged 62, pleaded guilty and a first offender. Acid was used to hurt the victim;
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> (e) *Anbalagan a/l Murugesu lwn Pendakwa Raya* [2013] 9 MLJ 88 the High Court affirmed the sentence of *eight years' imprisonment*. The appellant pleaded guilty after the first witness testified. The weapons used were an iron rod, iron, bottle and bowl. The victim suffered various internal injuries and was in coma for twelve days;
>
> (f) *Chew Eng Aik lwn Pendakwa Raya* [2015] 10 MLJ 799; [2014] 1 LNS 1303 the High Court affirmed the sentence of *seven years' imprisonment*. The appellant was a first offender, claimed trial and convicted. The weapon used was a parang. The victim suffered multiple wounds and received treatment for wound exploration haemostasis and primary suture of multiple deep lacerations wounds over extremities, under general anaesthesia;
>
> (g) *Abd Halim Abd Samat* the Court of Appeal substituted a binding over

order under sub-s 294(1) with a sentence of *ten years' imprisonment*. The respondent aged 45 and pleaded guilty and a first offender. The weapon used in the commission of the offence was a parang. The injuries sustained were multiple lacerations on the victim's head, right ear, right forearm and hand. The most proximal wound at the right forearm was deep cutting the muscles and the ulna bone causing an open fracture;

(h) *Magenthiran Allagari lwn Pendakwa Raya* [2015] MLJU 2343; [2015] 1 LNS 33 the High Court affirmed the sentence of *twelve years' imprisonment*. The appellant was a first offender, claimed trial and convicted. The weapon used was a parang. The victim's left arm was almost severed and fractured his left arm and leg;

(i) *Lee Kian Yap lwn Pendakwa Raya* [2015] MLJU 2342; [2015] 1 LNS 152 the High Court affirmed the sentence of *six years' imprisonment and three strokes*. He was a first offender, claimed trial and convicted. The weapon used was a knife. He suffered stab wounds on the abdomen left side of the chest and at his back;

(j) *Hafiz Fathullah v Public Prosecutor* [2016] MLJU 773; [2016] 1 LNS 989 the High Court affirmed the *sentence of fifteen years' imprisonment and eight strokes*. The appellant pleaded guilty and a first offender. The weapon used was a pen knife. The victim suffered multiple injuries and had 100 stitches all over her body. She also underwent a surgical operation on her left arm in order to repair the damaged and cut muscles;

(k) *Mazlan Ahmad v Pendakwa Raya* [2016] MLJU 1879; [2016] 1 LNS 205 the High Court affirmed the sentence of *seven years' imprisonment and five strokes*. The appellant pleaded guilty and a first offender. The weapon used was a parang. The victim suffered injuries at the back of his neck, broke his spine and brain haemorrhage;

(l) *Sellvam a/l Sangaralingam & Anor v Pendakwa Raya and another appeal* [2016] MLJU 1298 the High Court enhanced the sentence of *eight years' imprisonment to eleven years and four strokes*. The appellants claimed trial and were convicted. The weapons used were parang. The victim suffered multiple injuries and fractures; and

(m) *Budiman bin Che Mamat v Public Prosecutor* [2017] MLJU 1960; [2017] 1 LNS 1936 the High Court affirmed the *eight years' imprisonment and one stroke*. The appellant aged 30, pleaded guilty and a first offender. The weapon used was 'besi kuku kambing'. The victim's both arms were fractured and his ear was almost ripped off.

[44] The sentences meted out differed from one case to another depending on various factors discussed in the judgments. But they were all for deterrent sentence in view of the seriousness of the offence with the element of public interest being the foremost consideration. Factors like first offender and pleading guilty apparently did not really find favour with the courts in cases of this nature. (Emphasis added.)

[39] In *Rozita Mohamad Ali*, the High Court sentenced the accused person to eight years imprisonment for an offence under s 326 of the Penal Code. The

charge had originally been an offence of attempted murder under s 307 of the Penal Code. The injuries suffered by the victim were almost fatal to the victim.

CONCLUSION

[40] This court is of the opinion that for the offence under s 326 of the Penal Code, the sentence of eight years imprisonment with two strokes of whipping is a sentence that is within the parameters of an acceptable imprisonment terms as demonstrated in previous cases. This court is also of the considered view that it reflects the current trend of sentencing.

[41] For the offence of kidnapping with intention to secretly or wrongful confine under s 365 of the Penal Code, a sentence of three years is appropriate and it does commensurate with the offence committed where the confinement was less than 24 hours.

[42] On the issue of concurrent or consecutive sentences, this court, in exercising the allowable discretion bestowed on it and relying on the one transaction principle, finds that justice is served if both the punishments were to run concurrently.

Order accordingly.

Reported by Ahmad Ismail Illman Mohd Razali